

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FERNANDO CARDONA	:	DETERMINATION
	:	DTA NO. 818709
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law for the Year 1992.	:	

Petitioner, Fernando Cardona, 84 Grove Street, Newburgh, New York 12550, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the Year 1992.

On February 22, 2002, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that there are no material issues of fact and that the facts mandate a determination in favor of the Division of Taxation. Petitioner filed a response to the motion on March 29, 2002. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel). Petitioner appeared pro se. Based on the pleadings and motion papers, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether summary determination should be granted in favor of the Division of Taxation because there are no facts in dispute and the facts mandate a determination in favor of the Division.

II. Whether a frivolous petition penalty should be imposed under the authority of Tax Law § 2018 and section 3000.21 of the Tax Appeals Tribunal Rules of Practice and Procedure.

FINDINGS OF FACT

1. Petitioner, Fernando Cardona, did not file a 1992 New York State personal income tax return.

2. The Division of Taxation (“Division”) received a notice of Income Tax Examination Changes from the Internal Revenue Service (“IRS”). This notice showed that petitioner, a New York resident, received wage and interest income in 1992 in the amount of \$56,197.00. It also showed that petitioner had failed to report this income on a Federal return and that adjustments had been made by the IRS to correctly reflect petitioner's Federal adjusted gross income. Petitioner did not report these Federal changes to the Division.

3. Based on the information received from the IRS, the Division calculated petitioner's 1992 New York State personal income tax liability and issued to petitioner a Statement of Proposed Audit Adjustment dated November 15, 1999. The statement contains the following explanation:

A search of our files fails to show a New York State income tax return filed under your name or social security number. Therefore, your New York State income tax is estimated as allowed by New York State Income Tax Law.

We have computed your New York tax based on information obtained from the Internal Revenue Service under authorization of federal law (section 6103(d) of the Internal Revenue Code).

Income from wages on your New York return has been corrected to include the federal adjustment.

If you furnish wage and tax statement(s), we will allow New York taxes withheld.

If you do not have your wage and tax statement(s), you should obtain duplicate or reissued statement(s) from your employer(s) showing wages earned and taxes withheld.

Interest and/or dividend income on your New York return has been corrected to include the federal adjustment.

Penalty for late filing has been applied at 5% per month up to a maximum of 25% (section 685(a)(1) of the New York State Tax Law).

Interest is due for late payment or underpayment at the applicable rate.
Interest is required under New York State Tax Law.

Petitioner's New York State personal income tax was calculated as follows:

Federal adjusted gross income:	56,197.00
New York adjusted gross income:	56,197.00
New York deduction:	6,000.00
Dependent exemptions:	0.00
New York taxable income:	50,197.00
New York state tax:	3,593.00

4. Petitioner never responded to the Statement of Proposed Audit Adjustment.

Consequently, the Division issued to petitioner a Notice of Deficiency, dated April 10, 2000, asserting personal income tax due for 1992 in the amount of \$3,593.00 plus interest and penalty.

5. The facts stated above are based upon the affidavit of Earl Tennyson, a Tax Technician IV in the Division, whose duties include the supervision of audits of New York State personal income tax returns. In the course of his duties, he also verifies the filing of returns and the filing of Federal audit changes by New York taxpayers. All of the documents referred to above were attached to his affidavit which explained the import of those documents.

6. The Division's Bureau of Conciliation and Mediation Services issued to petitioner a Conciliation Order, dated April 20, 2001, sustaining the statutory notice.

7. On August 29, 2001, petitioner filed a petition with the Division of Tax Appeals. In that petition, he alleged that the Commissioner of Taxation and Finance made the following errors:

- (a) Error in holding that, or proceeding as if, the petitioner is liable for the penalties as listed in the statutory Notice [sic] and prospective statutory interest.
- (b) Error in holding that, or proceeding as if, the petitioner had gross and/or taxable income in the amount listed in the statutory Notice [sic] and prospective statutory interest.
- (c) Error in holding that, or proceeding as if, the petitioner engaged in excise taxable activities for profit.

The petition makes the following allegations of fact:

- (a) That petitioner is not liable for penalty/interest in the amounts claimed, because deficiencies do not exist in said amounts once the true gross and/or taxable income are determined. The respondent did not allow any personal or business deductions.
- (b) That petitioner denies that the amounts stated as taxable income in the statutory Notice are correct. The respondent did not allow any personal or business deductions.
- (c) That petitioner denies the statutory Notice [sic] contains specific and credible evidence of excise taxable activities engaged in for profit.

8. In its answer, the Division denied the allegations of fact made in the petition. In addition, the Division requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous petition pursuant to section 2018 of the Tax Law and section 3000.21 of the Tax Appeals Tribunal Rules of Practice and Procedure.

9. The Division commenced the instant proceeding for summary determination by the filing of a motion on February 26, 2002. As a basis for its motion, the Division notes that the deficiency was calculated on the basis of petitioner's unreported wage income and that petitioner has not provided any evidence to show that the Division's calculation of tax due is incorrect. The Division renewed its request for imposition of a frivolous petition penalty.

10. In response to the Division's motion, petitioner submitted a statement in which he asserted that the Federal income tax is an indirect tax in the nature of an excise tax. Based on that assertion, he argues that he was not involved in any taxable activities in 1992.

CONCLUSIONS OF LAW

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

“To obtain summary determination it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form” (*Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790, 791-792; *see also*, 20 NYCRR 3000.9[b]). Generally, with exceptions not relevant here, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]). Unsubstantiated allegations

or assertions are insufficient to raise an issue of fact (*Matter of Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276, 413 NYS2d 309).

B. The Division has presented sufficient evidence to establish that there are no triable issues of fact. That evidence consists of the IRS notice of Income Tax Examination Changes establishing that petitioner had New York income subject to tax in the amount of \$56,197.00 in 1992; the affidavit of Mr. Tennyson which establishes that petitioner failed to file a New York State income tax return in 1992 and that he did not report the Federal changes to his Federal adjusted gross income; and a copy of the Division's Statement of Proposed Audit Adjustment which fully explains the basis for the issuance of the Notice of Deficiency. Petitioner offered no evidence whatsoever to raise any issue of fact regarding his liability for the tax asserted.

C. Pursuant to Tax Law § 612(a), “[t]he New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year.” IRC § 62(a) defines federal adjusted gross income in the case of an individual, as “gross income minus [specified] deductions.” None of the deductions listed in IRC § 62(a) include wage, salary or interest income. “Compensation for services, including fees, commissions, fringe benefits, and similar items” and “interest” are among the items included as income for Federal tax purposes (IRC § 61[a][1],[4]). The record proves that petitioner was subject to Federal income tax on his 1992 wages and interest income and is subject to New York State personal income tax on those same amounts.

Petitioner has not presented any evidence to substantiate his claim that the statutory notice is incorrect. Accordingly, the facts are undisputed and a determination may be entered in favor of the Division as a matter of law.

D. Instead of addressing the Division's justified assertion of a tax deficiency, petitioner offers a spurious argument based on the 16th Amendment to the United States Constitution. This and similar argument have been addressed and rejected many times in various Federal courts. For example, in *Cardinalli v. Commissioner* (39 TCM 514, 515, *affd* 649 F2d 866), the United States Tax Court held “that the levying of an income tax on the salary received by petitioner for personal services is not unconstitutional for any reason and does not violate due process of law” (*see also, Matter of Ellett*, Tax Appeals Tribunal, October 18, 2001; *Matter of Lang*, Tax Appeals Tribunal, July 8, 1993; 1998 CCH Standard Federal Tax Reporter, Vol.14, ¶ 40,843 and the cases cited therein).

E. Tax Law § 2018 authorizes the Tax Appeals Tribunal to impose a penalty “if any petitioner commences or maintains a proceeding in the Division of Tax Appeals primarily for delay, or if the petitioner’s position in such proceeding is frivolous.” A penalty may be imposed on the Tribunal’s own motion or on motion of the Office of Counsel of the Division of Taxation (20 NYCRR 3000.21). The maximum penalty allowable under this provision is \$500.00 (Tax Law § 2018). Section 3000.21 provides as an example of a frivolous position “that wages are not taxable as income.” This is the exact position advanced by petitioner.

F. In its answer to the petition, the Division requested that the maximum penalty for the filing of a frivolous petition be imposed. The Division further placed petitioner on notice of the existence of the frivolous petition issue in its motion for summary determination. Inasmuch as there is no basis in fact or law for petitioner's position, I find that the maximum penalty of \$500.00 is appropriate.

G. The Division's motion for summary determination in its favor is granted; the petition of Fernando Cardona is denied; the Notice of Deficiency dated April 10, 2000 is sustained; and a penalty of \$500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
May 9, 2002

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE